PRIVY COUNCIL REPORT

CHAN CHENG KUM & ANOR. v. WAH TAT BANK LTD. & ANOR.

[P.C. (Lord Upjohn, Lord Devlin & Lord Pearson)
March 29, 1971]

[Privy Council Appeal No. 6 of 1969]

Shipping — Carriers — Mate's Receipts — Custom of trade between Sarawak and Singapore — Characteristic compared to bills of lading.

Mercantile Law — Custom of trade — Shipping — Mate's Receipt — Liability upon — Civil Law Ordinance (Cap. 24), s. 5(1).*

This was an appeal from the decision of the Federal Court ([1967] 2 M.L.J. 263). The respondents were two banks, the first Wah Tat Bank who carried on business in Sibu, Sarawak, and financed shipments from that port to Singapore made by merchants called Tiang Seng Chan (Singapore) Ltd. and the other bank, the Oversea-Chinese Banking Corporation Ltd., who acted as Wah Tat's correspondents and agents in Singapore; both banks are referred to herein compendiously as "the bank".

The terms of the arrangement for financing of the shippers by the bank were not in dispute. The bank advanced the money to pay the produce merchants who sold the goods to the shippers, and the shippers agreed to pledge the goods to the bank. The shippers, when they shipped the goods from Sibu to Singapore, obtained from the ship a "mate's receipt" in which the bank was named as consignee and delivered it to the bank together with other documents for which the bank stipulated, such as an insurance policy and a bill of exchange for the amount of the advance. The bill was presented for payment on arrival of the goods at Singapore and on payment the bank handed back the mate's receipt endorsed to the shippers so that they could get delivery of the goods.

In May and June 1961, the shippers, in breach of this arrangement, instructed the ship to deliver to them on arrival four consignments of pepper and rubber covered by 20 mate's receipts; and the ship did so against an indemnity and without production of the mate's receipts.

The bank sued the appellant-shipowners for conversion of the four consignments. The main issues to be decided were whether or not the mate's receipt was a document of title, and whether the shipment of the goods was delivery to the ship as bailee for the bank, thereby completing the pledge.

The bank contended that a mate's receipt must in this case be treated as a document of title equivalent to a bill of lading by virtue of a custom in the trade in which it was used. In the alternative, the bank sought to establish delivery on various other grounds based on attornment, estoppel and appropriation.

Held, dismissing the appeal: (1) as the mate's receipt in this case bore the words "Not negotiable" the alleged custom would in fact be repugnant to the document itself;

(2) in the circumstances of this case the shipment of the goods was a delivery to the ship as bailee for the bank so that the pledge was completed and the bank given the possessory title on which it relies, thereby entitling it to succeed in its claim for conversion.

Semble: "A good and established custom 'obtains the force of a law, and is, in effect, the common law within that place to which it extends'. Thus the custom in this case, if proved, takes effect as part of the common law of Singapore. As such it will be applied by any court dealing with any matter which that court treats as governed by the law of Singapore. In this sense it is binding not only in Singapore but on anyone anywhere in the world."

Observations on mercantile custom and trade usage relating to carriage of goods by sea between Sarawak and Singapore.

Cases referred to:-

(1) *Hathesing* v. *Laing* (1873) L.R. 17 Eq. 92.

(2) *Nippon Yusen Kaisha* v. *Ramjiban Serowgee* [1938] A.C. 429.

(3) *Bryans* v. *Nix* (1839) 4 M. & W. 775; 150 E.R. 1634.

(4) *Evans* v. *Nichol* (1841) 3 M. & G. 614; 133 E.R. 1286.

(5) *Lickbarrow* v. *Mason* (1794) 5 T.R. 683; 101 E.R. 380.

(6) *Fraser* v. *Evans* (1867) 6 N.S.W. 325.

(7) *Merchant Banking Company of London* v. *Phoenix Bessemer Steel Company* (1877) 5 Ch. D. 205.

(8) *Lockwood* v. *Wood* (1844) 6 Q.B. 50; 115 E.R. 19.

(9) *Dublin City Distillery Ltd.* v. *Doherty* [1914] A.C. 823.

(10) *Official Assignee of Madras* v. *Mercantile Bank of India, Limited* [1935] A.C. 53.

(11) *The Odessa* [1916] A.C. 145.

PRIVY COUNCIL APPEAL.

R. J. Parker Q.C., *M.J. Mustill* Q.C. and *K. A. O'Conner* for the appellants.

J. C. Le Quesne Q.C., *J. Hobhouse* and *M. Karthigesu* for the respondents.

Lord Devlin (delivering the judgment of the Board): The respondents in this case, plaintiffs at first instance, are two banks. The first is the Wah Tat Bank who carried on business in Sibu in Sarawak and who financed shipments from that port to Singapore made by merchants called Tiang Seng Chan (Singapore) Limited. The other bank is the Oversea-Chinese Banking Corporation Ltd. who acted as Wah Tat's correspondents and agents in Singapore. For the purposes of this case no distinction need be drawn between the two banks who can be referred to compendiously as "the bank".

The arrangement whereby the bank financed the shippers was made orally but its terms were not in dispute. The bank advanced the money to pay the produce merchants who sold the goods to the shippers and the shippers agreed to pledge the goods to the bank. The shippers, when they shipped the goods from Sibu to Singapore, obtained from the ship a mate's receipt in which the bank was named as consignee and delivered it to the bank together with other documents for which the bank stipulated, such as an insurance policy and a bill of exchange for the amount of the advance. The bill was presented for payment on arrival of the goods at Singapore and on payment the bank handed back the mate's receipt endorsed to the shippers so that they could get delivery of the goods.

In May and June 1961 the shippers, who were evidently in financial difficulties, in breach of this arrangement instructed the ship to deliver to them on arrival four consignments of pepper and rubber covered by 20 mate's receipts; and the ship did so against an indemnity and without production of the mate's receipts. These are the circumstances in which the bank sue the shipowners, the defendants at first instance and

* Now Civil Law Act (Cap. 30, 1970 Edn.)

the appellants before the Board, for conversion of the four consignments.

The bank's agreement with the shippers was, it is conceded by the appellants, such as to constitute them equitable pledgees of the goods. Had they given notice of their interest to the ship and had they intervened in time, they might have succeeded in restraining the ship from parting with the goods. But they gave no notice; and anyway by suing in trover are relying only on their rights at common law. At common law a pledge of goods is not complete without delivery. Delivery is likewise necessary to give the bank the possessory right without which they cannot sustain an action for conversion. So the question in this appeal is simply whether there has been delivery, actual or constructive, of the goods to the bank.

If the mate's receipt had been a bill of lading, the legal position would be beyond dispute. Not only is the bill of lading a document of title, but delivery of it is symbolic delivery of the goods. But the mate's receipt is not ordinarily anything more than evidence that the goods have been received on board. This is so firmly settled by *Hathesing* v. *Laing*[1] and *Nippon Yusen Kaisha* v. *Ramjiban Serowgee*[2] that the respondents have not sought to argue otherwise. Their contention is that a mate's receipt must in this case be treated as a document of title equivalent to a bill of lading by virtue of a custom in the trade in which it was issued. In the alternative, they seek to establish delivery on various other grounds based on attornment, estoppel and appropriation. The action failed at first instance in the High Court of Singapore, Kulasekaram J. giving judgment against the plaintiffs on December 30, 1965. This judgment was reversed in the Federal Court of Malaysia on 7th July 1967. The Chief Justice, who delivered the judgment of the court, found the alleged custom to be good in fact and in law and held consequently that as holders of the mate's receipts the bank had the right to possession from the ship. He held also that the ship was estopped from denying the bank's right to possession; and further that there had been an appropriation of the goods by the shippers to the bank by virtue of which on the authority of *Bryans* v. *Nix*[3] and *Evans* v. *Nichol*[4] the bank could make good its claim.

Their Lordships have concluded that the action should succeed upon the comparatively simple ground that in the circumstances of this case the shipment of the goods was a delivery to the ship as bailee for the bank so that thereby the pledge was completed and the bank given the possessory title on which it relies. This makes the plea of estoppel superfluous and their Lordships need not deal with it. Nor need their Lordships discuss the pleas of attornment and appropriation. Furthermore their Lordships' conclusion, since it is immaterial to it whether or not the mate's receipt was by local custom a document of title, makes it, strictly speaking, unnecessary for them to deal with the issue which was the chief matter in debate in the courts below as well as before the Board. But since the allegation of custom has been so fully explored in evidence and in argument and in the judgments of the courts below and since it is obviously a matter of some importance in the port of Singapore, their Lordships think it right that they should reach and state a conclusion upon it; and it is convenient that they should begin by considering it.

He who sets up a custom must first prove as a matter of fact the existence of a practice that is sufficiently widespread within the area in which it is alleged to exist, to make it part of the local usage; and then he must show that the practice he has established conforms with the law's requirements for a valid custom. A great deal of evidence for and against the existence of the practice was called at the trial. The trial judge made no finding of fact because he took the view that the custom, if proved, would inevitably be bad in law. On appeal it was agreed that the Federal Court was in as good a position as the trial judge to assess the value of the oral evidence. The court concluded that a custom was proved which the Chief Justice expressed in the following terms:

> "I am accordingly of the opinion that the appellants have proved that it is a custom of the trade relating to shipment of goods between Sarawak ports and Singapore that mate's receipts such as those to which this present action relates are treated as documents of title to the goods thereby covered, in the same way as bills of lading".

The Board would hesitate long before it reversed on the facts a finding of this character by the Supreme Court of the State. It is satisfied in this case that there was ample evidence to justify the conclusion of fact. It has been suggested that the Chief Justice's finding was intended to apply only to the trade from Sarawak to Singapore and not to the trade in the opposite direction and the Board has been referred to earlier passages in the judgment which seem to support this suggestion. The finding in the narrower form is sufficient for the respondents in this case which is concerned with shipments from Sarawak to Singapore. But as the point is of general importance, their Lordships will express their opinion that the evidence is sufficient to justify the wider finding. The difference between the two is that the evidence shows that from Sarawak to Singapore between 90 per cent and 95 per cent of the traffic was being carried on mate's receipt without a bill of lading whereas in the opposite direction the percentage was between 75 per cent and 80 per cent. But the custom alleged was not one which excluded the use of a bill of lading. There was shown to be a minority who for one reason or another, mainly when cargoes from Sarawak were being transhipped at Singapore for onward carriage across the seas, demanded a bill of lading in the usual way in exchange for the mate's receipt. Of course if a number of shippers concerned solely with the local trade had demanded a bill of lading, it would be difficult to show any sufficiently widespread usage in relation to the mate's receipt. But, once it is established that the great preponderance of such traffic is carried on mate's receipt alone, the issue turns on what the evidence shows about the treatment of the mate's receipt. The evidence on this point does not differentiate between traffic from Sarawak to Singapore and traffic from Singapore to Sarawak. In the one category as much as in the other the mate's receipt was regularly negotiated in the same way as a bill of lading.

The trial judge expressed as follows his reasons for disregarding the evidence on custom.

"no amount of custom as that described in this case can change the character of this document so as to confer any additional rights and thus make the mate's receipt equivalent to documents of title. A local custom however strong can never achieve this effect".

It could be achieved, he said, only if the custom had been proved "to be applicable all over the world". What otherwise, he asked, would be the position of a new carrier who came into the trade.

Certainly there have not been many cases since the famous case of *Lickbarrow* v. *Mason*[5] (which declared that by the custom of merchants bills of lading were negotiable and transferable) in which custom has created a document of title. The point was entertained but not decided in *Bryans* v. *Nix*. Mr. Le Quesne has cited two cases in which a custom to treat warehouse certificates or warrants as documents of title was held good: *Fraser* v. *Evans*[6] and *Merchant Banking Company of London* v. *Phoenix Bessemer Steel Company*.[7] In the only case however in which a mate's receipt has been considered, the allegation that it was by custom a document of title failed. This is the case already referred to of *Hathesing* v. *Laing* in which the plaintiffs sought to prove a custom at Bombay. As an authority for its main proposition that a mate's receipt is not under the ordinary law a document of title, *Hathesing* v. *Laing* has stood unquestioned for nearly a century and is now unassailable. But as a decision on custom it turns on its own facts. Bacon V-C. was apparently not satisfied that a custom was proved in fact; at page 104 he described the evidence as showing possibly a "pernicious and loose habit". There are thereafter observations in his judgment which might be read as going either to the weight of the evidence or as designed to show that the custom, if proved, would have been bad in law. If intended to fall under the latter head, their Lordships could not accept them all as criteria of general application for determining the validity of a custom.

Their Lordships can see no reason in principle why a document of title should not be created by local custom. As the Chief Justice pointed out in the Federal Court, a custom is unlikely to be "applicable all over the world" until it has first been applied in various localities. The test imposed by the trial judge, their Lordships consider with respect, shows a misunderstanding of the nature and effect of a mercantile custom. On the other side a somewhat similar misunderstanding is shown in the respondents' notice of appeal to the Federal Court in which the custom or practice contended for is described as one "whereby merchants, bankers and carriers by sea acknowledged and accepted that mate's receipts were documents of title". Their Lordships will consider these two matters together.

In speaking of a custom of merchants the law has not in mind merchants in the narrow sense of buyers and sellers of goods. A mercantile custom affects transactions either in a particular trade or in a particular place, such as a market or a port, and binds all those who participate in such transactions, whatever the nature of their callings. It is true that a document relating to goods carried by sea and said to be negotiated through banks could hardly be recognised as a document of title if the evidence did not show it to be treated as such by shipowners, shippers and bankers. But the limits of the custom, if it be established, are not to be defined by reference to categories of traders or professional men; if established, it binds everyone who does business in whatever capacity. To describe a custom as belonging to particular callings diverts attention from its true character which consists in its attachment to a trade or place.

Universality, as a requirement of custom, raises not a question of law but a question of fact. There must be proof in the first place that the custom is generally accepted by those who habitually do business in the trade or market concerned. Moreover, the custom must be so generally known that an outsider who makes reasonable enquiries could not fail to be made aware of it. The size of the market or the extent of the trade affected is neither here nor there. It does not matter that the custom alleged in this case applies only to part of the shipping trade within the State of Singapore, so long as the part can be ascertained with certainty, as it can here, as the carriage of goods by sea between Sarawak and Singapore. A good and established custom "obtains the force of a law, and is, in effect, the common law within that place to which it extends": *Lockwood* v. *Wood*.[8] *per* Tindal C.J. at p. 64. Thus the custom in this case, if proved, takes effect as part of the common law of Singapore. As such it will be applied by any court dealing with any matter which that court treats as governed by the law of Singapore. In this sense it is binding not only in Singapore but on anyone anywhere in the world.

The common law of Singapore is in mercantile matters the same as the common law of England, this being enacted in the Laws of Singapore (1955) Chapter 24 section 5(1). Accordingly, the question whether the alleged custom, if proved in fact as their Lordships hold that it is, is good in law must be determined in accordance with the requirements of the English common law. These are that the custom should be certain, reasonable and not repugnant. It would be repugnant if it were inconsistent with any express term in any document it affects, whether that document be regarded as a contract or as a document of title.

In their Lordships' opinion the custom alleged is neither uncertain nor unreasonable. The form of mate's receipt used is similar to a bill of lading and there is no difficulty about treating it as an equivalent. In this respect it may be contrasted with the form considered in *Hathesing* v. *Laing* which appears to have been a receipt and nothing more and not to have named a consignee. Their Lordships can see nothing unreasonable in using the mate's receipt in this case as a document of title. The law knows that to require the physical delivery of goods whenever they change hands in trade would be unreasonable and recognises the need of merchants for a document that will represent the goods. It was by the custom of merchants that the bill of lading became such a document. But

no documentary form is immutable. It is quite a natural development first for the mate's receipt to become more elaborate and then for merchants to feel that in certain cases the bill of lading can be dispensed with. The function of the commercial law is to allow, so far as it can, commercial men to do business in the way in which they want to do it and not to require them to stick to forms that they may think to be outmoded. The common law law is not bureaucratic.

There would be uncertainty or unreasonableness if in relation to the same consignment a bill of lading and a mate's receipt, both documents of title, could be in circulation at the same time. The evidence was however unanimous that the bill of lading, when it was issued in this trade, was issued only in exchange for the appropriate mate's receipt. This is indeed the normal practice throughout the world, but, so long as possession of the mate's receipt is only evidence of title (the mate's receipt not being a document of title), the master must be at liberty at his peril to issue the bill of lading on such other evidence as he chooses to accept. The establishment of the mate's receipt as a document of title would necessarily deprive the master of this degree of liberty, for he would then be as much at fault in issuing a bill of lading without the delivery up of the mate's receipt as he would be if he issued a second set of bills of lading without delivery up of the first. It has not however been argued, — rightly so, their Lordships think, — that in this respect the treatment of the mate's receipt as a document of title would be repugnant to any principle of law.

Up to this stage their Lordships find themselves entirely in agreement with the judgment of the Chief Justice. The factor that in the end compels them to differ from his conclusion is the presence on the mate's receipt of the words "Not negotiable".

These words are part of the printed form. Their presence on a mate's receipt which is to be used simply as such may be superfluous, but it is not incongruous. The only meaning, whether it be a popular or a legal meaning, that can be given to this marking is that the document is not to pass title by endorsement and delivery. Unfortunately businessmen frequently do not trouble themselves about such points. These documents were from the beginning of the practice, which goes back at least forty years, handled just as if they were negotiable and transferable by endorsement. In 1959, that is, two years or less before the events which the Board is considering, a third shipping line went into the Singapore/Sarawak trade which up to then had been divided between two shipping companies. The manager of this third line, understanding that it was customary in the Sarawak trade to effect delivery on a mate's receipt, omitted the words "Not negotiable" from the top copy which was given to the shipper. There is no evidence as to what proportion of the mate's receipts subsequently in circulation was issued by this line, but it is clear that the custom had already been established entirely in relation to documents marked "Not negotiable"

Nearly all the witnesses were asked their view of this marking. The minority, who did not treat the mate's receipt as a document of title, naturally found the marking appropriate. Those in the majority expressed their view in different words which all amounted to much the same thing, — that they had never considered what the marking meant, that they paid no attention to it, that it meant nothing, that it was unimportant: and one witness said that the words had lost all significance and were purposeless. The Chief Justice found "that everybody connected with this trade has ignored these printed words".

The question is whether a court of law can also ignore them. The courts are well aware of the tendency of businessmen to retain in the documents they use inapplicable or outmoded expressions; and they endeavour, albeit with reluctance since the retention is inevitably a source of confusion — to give effect to what they take to be the true nature of the document. There are well established rules of construction which permit the court to disregard printed words when they are inconsistent with written words or with the paramount object which the document appears from its language to be designed to achieve. But these rules can be used only when there is a conflict between one part of the document and another or between the effect of a part and the effect of the whole. They are rules for reconciling different expressions in or of the document itself. They cannot be used to introduce into the document, either by implication or by force of custom, what is outside it. The rule is plain and clear that inconsistency with the document defeats the custom. If this document had "Negotiable" printed in the right hand corner and "Not negotiable" in the left, the argument could begin. But if the right hand corner is blank, custom cannot be used to fill it. Whichever way the argument for the respondents is put, it amounts in the end to a submission that the force of custom should expel from the document words that are on it: this is not permissible by law.

The custom, in the terms in which it is pleaded and found by the Chief Justice, is a custom to treat the mate's receipt as equivalent to the bill of lading. Is it permissible to put the evidence supporting the custom into two compartments? Unless negotiability is an essential characteristic of a bill of lading, then a custom to treat a mate's receipt as a bill of lading that is, as a non-negotiable bill of lading where so marked and otherwise as negotiable, would be unobjectionable. This would be sufficient for the bank in this case since they were named as consignees on the bill of lading and so did not obtain their title by endorsement. This way of putting the case on custom raises two questions. The first is whether a non-negotiable bill of lading would pass a good title to the consignee, though not beyond; and the second whether the evidence can be divided, part being effective to prove the custom pleaded and the remainder being ineffective to alter the meaning of the words "Not negotiable".

It is well settled that "Negotiable", when used in relation to a bill of lading, means simply transferable. A negotiable bill of lading is not negotiable in the strict sense; it cannot, as can be done by the negotiation of a bill of exchange, give to the transferee a better title than

the transferor has got, but it can by endorsement and delivery give as good a title. But it has never been settled whether delivery of a non-negotiable bill of lading transfers title or possession at all. The bill of lading obtains its symbolic quality from the custom found in *Lickbarrow* v. *Mason*[5] and that is a custom which makes bills of lading "Negotiable and Transferable" by endorsement and delivery or transmission. To the same effect the Bills of Lading Act 1855 recites that a bill of lading is by the custom of merchants "transferable by endorsement". There appears to be no authority on the effect of a non-negotiable bill of lading. This is not surprising. When consignor and consignee are also seller and buyer, as they most frequently are, the shipment ordinarily serves as delivery [Sale of Goods Act 1893, section 32(1)] and also as an unconditional appropriation of the goods [section 18 rule 5(2)] which passes the property. So as between seller and buyer it does not usually matter whether the bill of lading is a document of title or not.

Their Lordships have explored this question up to this point because it has a bearing on their ultimate decision. They do not consider it further since they are satisfied that the evidence in this case cannot be treated as proving only a truncated custom. The custom was well established before 1959 and it was not until then that, so far as is known, some unmarked receipts came into circulation. The custom does not operate upon a mate's receipt in abstraction. A mate's receipt may take different forms; it may or may not, for example, specify a consignee. The custom operates, not upon the idea of a mate's receipt whatever form it may take, but on the form of document actually in use. The form in use in this trade was marked "Non-negotiable". It is perhaps not so much a question of dividing the custom as of dividing the form. But any way on the evidence in this case neither can be done and both custom and form must stand or fall as a whole. As a whole the custom as applied to this form is bad in law.

Their Lordships will turn now to the issue on which they decide this case, that is, the contention by the bank that, whether or not the mate's receipt was a document of title, the shipment of the goods was delivery to the ship as bailee for the bank, and thereby the pledge was completed. The appellants point out that the bank was not a party to the contract of carriage evidenced by the mate's receipt. Naming the bank as consignee gave it no contractual rights. The ship would in the ordinary way deliver the goods to the bank as consignee, not in acknowledgment of the bank's right to have them but because it was under contract to the shipper to deliver as instructed. The instructions they say were not irrevocable; and when the shipper changed them, the bank, never having had any rights of its own against the ship, cannot make good its complaint.

This way of looking at the issue may help to clarify it but does not change it. It brings it back to the same point which is whether there was delivery to the bank on shipment. If there was, the bank alone have the right to possession and the ship, whether innocently or otherwise, converted the goods when she parted with them to the shipper, the fact that she was acting in accordance with the contract of carriage being no defence. If there was not, the bank fails; and it is hardly necessary to point out that it has no rights under a contract on which it is not suing.

As their Lordships have already observed, if this was a contract of sale, the legal position would be clear enough. *Prima facie* shipment would be delivery. This was well established before 1893 and section 32 merely codifies the law on the point. What then is the position in a contract of pledge? The two authorities cited on this point are *Bryans* v. *Nix* and *Evans* v. *Nichol*. They are considered in detail in the judgment of the Chief Justice, but before the Board Mr. Le Quesne has relied upon them for the rather different purpose of showing that, in pledge as in sale, shipment is *prima facie* delivery under the contract. In both these cases there was a contract of pledge, a shipment, a delivery of a mate's receipt to the plaintiff and the delivery of goods to the defendant; and in both the plaintiffs' suit in trover succeeded. Mr. Parker has invited the Board to disregard these cases, which he submits cannot stand with later authorities, such as *Dublin City Distillery Ltd.* v. *Doherty*[9] and *Official Assignee of Madras* v. *Mercantile Bank of India, Limited*[10] which make it abundantly clear that transfer of possession is the essence of pledge.

Their Lordships agree that the need for delivery and the transfer of possession was not apparently so well understood in 1840 as it is today. The courts in *Bryans* v. *Nix* and *Evans* v. *Nichols* both handled the problem before them as raising questions of property rather than possession. A pledgee is said to have a special property in the goods. Mr. Parker referring to *The Odessa*[11] has rightly pointed out that this is not property in the ordinary sense; the pledgee has not even temporarily the use and enjoyment of the goods but simply the right to retain them until the pledge is honoured and, if it is not, to sell them and reimburse himself out of the proceeds. Are the rules relating to appropriation really applicable? Their Lordships do not propose to discuss this question. As the law stands today, appropriation without delivery will not create a pledge. If, as is very likely, the act of appropriation and the act of delivery are one and the same, it is simpler and clearer in relation to a pledge to speak of it solely as delivery; if they are not the same, then appropriation by itself is insufficient.

In *Bryans* v. *Nix* the judgment speaks of property, absolute or special, and the intention to pass it. But the relevant act of appropriation was the placing of the goods "in the hands of a depositary", *i.e.*, delivery to the boat. When the loading was completed the shipper obtained a receipt naming the plaintiff as consignee; and then wrote to the plaintiff enclosing a bill drawn on him, which some days later he accepted. Baron Parke said:

> "If the intention of the parties to pass the property, whether absolute or special, in certain ascertained chattels, is established, and they are placed in the hands of a depositary, no matter whether such depositary be a common carrier, or ship-master, employed by the consignor, or a third person, and the chattels are so placed on account of the person who is to have that property; and the depositary assents; it is enough: and it matters not by what documents this is effected;"

The court treated the shipment as a conditional appropriation which became absolute on the acceptance of the bill.

Consideration of the case of *Evans* v. *Nichol*[4] is complicated by the fact that there are three differing reports of the judgments. The report in 3 Man. & G. 614, which is also in 133 E.R. 1286 and which was cited in the Federal Court omits some important passages. The fullest report, which their Lordships will use is in 4 Scotts New Reports at 43. The decision of the Court of Common Pleas is best expressed in the judgment of Maule J. at 54:

> "It is admitted that the plaintiffs' right to recover would have been indisputable had the relation between Clapham and the plaintiffs been that of vendor and vendees, instead of pawner and pawnees. But the goods having been shipped by Clapham to the order of the plaintiffs upon their acceptance on the 500 *l.* bill, and the defendants having received them for the purpose of being delivered to the plaintiffs, and Clapham not having revoked the consignment, it appears to me that the plaintiffs acquired such an interest in the property and right to the possession as to entitle them to maintain trover against the defendants."

The value of this case to the respondents is that it puts sale and pledge on the same footing. Its value to the appellants is that it appears to recognize, in the case of pledge at any rate, the right to revoke a consignment. This is what the appellants say the shippers lawfully did when they changed their instructions to the ship and demanded delivery themselves.

On the latter point *Evans* v. *Nichol* is one among a number of authorities for the contention that shipment to a named consignee is not *per se* irrevocable; it does not necessarily amount to delivery to the consignee or to an appropriation of the property in the goods. Delivery and appropriation both depend upon the intention with which the shipment is made. The intention may be to retain both property and the right to possession; or it may be to deliver and appropriate either absolutely or conditionally. If the intention is to retain, the consignment can be revoked or changed at any time. If it is to deliver or appropriate absolutely, it cannot be revoked: if conditionally, the power of revocation depends upon the nature and terms of the condition. All the judges in *Evans* v. *Nichol* referred to the fact that the shipper, Clapham, had not revoked his instructions, and therefore the court did not have to consider what the position would have been if Clapham had done so or purported to do so during the carriage of the goods, as happened in this case.

Bryans v. *Nix* and *Evans* v. *Nichol* are on the whole for rather than against the respondents' argument. But the absence of clear authority leaves the question as one which must be decided on principle. In principle it is difficult to see why in the effect that is given to shipment there should be any difference between the contract of sale and the contract of pledge. Both contracts must provide for some means of delivery of the goods in order to complete the sale or the pledge as the case may be. The parties are free in either case to make what terms they like about delivery; but if the contract is silent and it is left to the court to interpret their intentions, it is difficult to see why the same presumption should not be made in both cases. In either case shipment would seem to be the most convenient place and time for delivery.

The existence of a *prima facie* rule does not of course absolve the court from considering carefully the circumstances of the particular case to see what they indicate about the intention to deliver. Their Lordships consider that the circumstances of this case, far from displacing the *prima facie* rule, speak strongly in support of its application.

The circumstances may allow of three possible occasions for delivery to the pledgee, the first on shipment, the second by attornment during the voyage, and the third by physical delivery at the conclusion of the voyage. The factors which make shipment the natural occasion for the delivery of the goods to the pledgee are all present in this case. Since the bank had already advanced the money, it would naturally want — and the shipper naturally be presumed ready to give — as soon as possible the possession without which the security would not be complete. Moreover, if delivery were to be delayed beyond shipment, it could not by either of the other two methods be done as easily and as conveniently.

As to the first of the two, attornment is a convenient, and indeed an inevitable, method when the contract to be implemented is made during transit. But if it is made before transit it is difficult to see any commercial sense in first making the carrier the bailee of the consignor and then turning him by attornment into the bailee of the consignee. Fresh instructions would have to be given to the carrier and his acceptance of them communicated to the consignee; this simply adds unnecessary documentation.

As to the third method, to delay delivery until arrival means that constructive delivery would be no longer possible and that a bank, which has no use for the goods in the way of trade, would have to take physical delivery of them, not so as to enforce its security but merely so as to obtain it. This general consideration is particularly applicable in the circumstances of this case. The course of business between the shipper and the bank shows that the shipper was expected to honour on arrival of the goods the bill presented for payment, receiving back in exchange the mate's receipt which would enable him to take delivery This was in fact what generally happened; it was only if the shipper failed to pay or delayed payment unduly that the bank would have to take physical delivery. Thus, if under the arrangement between the parties the pledge was not to be completed until physical delivery, it would have the curious result that there was a contract of pledge whereunder in the ordinary course of business and if it worked out as contemplated a pledge was never given at all.

There is no doubt at all that the arrangement between the parties required the delivery to the bank of the mate's receipt. Mr. Parker has argued from this that since all the parties believed, albeit erroneously, that the mate's receipt was a document of title, they must have intended to effect delivery by it and not upon shipment. Their Lordships do not agree. They con-

sider that for the reasons they have already given the function of a bill of lading or similar document of title is not normally to give delivery as between consignor and consignee. This has usually already happened on shipment and its real function is to give the consignee a document which he can immediately negotiate. Accordingly, the delivery of such a document as the mate's receipt was supposed to be is inconsistent with the notion that the pledge was still incomplete.

Their Lordships also attach importance to the finding of fact by the trial judge and sustained in the Federal Court that all parties knew what was going on. In other words, the ship knew of the bank's interest in the goods; and so of the risk she was taking, and for which she covered herself by an indemnity, in delivering the goods otherwise than to the named consignee.

For these reasons their Lordships have concluded that in this case delivery of the goods to the bank was made on shipment, that the pledge of them to the bank was thereby completed and that the bank succeeds in its claim for conversion.

Their Lordships therefore dismiss the appellants' appeal. With regard to costs it is to be observed that the major issue both in the evidence and in the argument before all courts was that of the alleged custom, and the respondents have failed on that issue, but they have on other grounds successfully resisted the appeal. Their Lordships vary the Federal Court's order as to costs so as to provide that the appellants pay two-thirds of the respondents' costs in the court below. The appellants must also pay two-thirds of the respondents' costs of this appeal

Appeal dismissed.
Order as to costs varied.

Solicitors: *Linklaters & Paines* agents for *Drew & Napier; Coward Chance* agents for *Allen & Gledhill.*

SINGAPORE REPORT

ZUELLIG (GOLD COIN MILLS) v. M.V. "AUTOLY" (OWNERS) THE M.V. "KANTANG"

[O.C.J. (Chua J.) October 30, 1970]

[Singapore — Admiralty Suit No. 51 of 1968]

Shipping — Carriage of goods by sea — Seaworthiness — Perils of the sea — Obligation of shipowner to exercise due diligence — Carriage of Goods by Sea Ordinance (1955 Ed. Cap. 173) Hague Rules Arts. III & IV.

The plaintiffs sought to recover damages under a bill of lading covering 1000 bags of maize received by the defendants for carriage from Singapore to Penang on the "Kantang". The bill of lading was expressly made subject to the Carriage of Goods by Sea Ordinance (1955 Ed. Cap. 173). On the voyage in question the "Kantang" sank in international waters in the Straits of Malacca on August 27, 1967, near the Sembilan Islands and the cargo she was carrying was lost.

The plaintiffs alleged that the defendants failed in breach of their duty to provide a seaworthy ship and failed before and at the beginning of the voyage to exercise due diligence to make her seaworthy as required by article III r. 1(a) of the Hague Rules Scheduled to the Ordinance. The defendants denied liability contending that the loss was caused by perils of the sea within the meaning of article IV r. 2(c) of the Rules. They also denied that the vessel was unseaworthy or that they had failed to use due diligence before and after and at the beginning of the voyage to render her seaworthy. They contended that the "Kantang" was at all material times a completely seaworthy vessel and was properly manned, equipped and supplied. They alleged that the sinking was caused by perils of the sea during rough weather, and contended that the unusually rough sea required that it be classified as perils of the sea exempting them from liability.

On the evidence the court found that the weather encountered by the "Kantang" was not of such a catastrophic nature or so overwhelming as to constitute perils of the sea and came to the conclusion that the vessel sank as it was unseaworthy in that the fastenings of the bow planking of the vessel were unsound whereby the bow planking worked loose in the heavy seas allowing water to enter the vessel and causing her to sink. The court rejected the plaintiffs' submission that if the defendants had not made out a case of perils of the sea then the plaintiffs were entitled to succeed.

The defendants adduced evidence to show that they had before and at the beginning of the voyage exercised due diligence to make the vessel seaworthy.

Held: (1) when the contract of carriage was subject to the Hague Rules, those rules exclude the common law absolute warranty of seaworthiness and substitute therefor an obligation on the part of the shipowner to exercise due diligence, before and at the beginning of the voyage, to make the ship seaworthy. The burden of proving the exercise of due diligence was on the defendants in this case;

(2) the shipowner's obligation to exercise due diligence "is limited to due diligence in his capacity as carrier and to such duties as appertain to a prudent and careful carrier acting as such by the servants and agents in his employment; but within this limitation the carrier's obligation is to see, if not with his own eyes, at any rate by the eyes of proper competent servants or agents for whose diligence he makes himself responsible, that the ship really is seaworthy; and if anyone of those servants or agents is negligent he will be liable";

(3) on the evidence in this case, the defendants had exercised due diligence to make the "Kantang" seaworthy and therefore they were entitled to the protection of the Ordinance.

Case referred to:-

(1) *The Xantho* (1887) 12 App. Cas. 503.

ADMIRALTY SUIT.

K. C. Chan for the plaintiffs.

C. H. Smith for the defendants.

Cur. Adv. Vult.

Chua J.: In this action the plaintiffs sue the defendants the owners of the motor vessel "Kantang", to recover damages under a bill of lading covering 1000 bags of Thailand Maize received by the defendants for carriage from Singapore to Penang. The bill of lading was expressly made subject to the Singapore Carriage of Goods by Sea Ordinance (Cap. 173). On the voyage from Singapore to Penang the "Kantang" sank in international waters in the Straits of Malacca on the 27th August, 1967, between Pulau Pangkor and Penang near the Sembilan Islands and the cargo she was carrying was lost and four members of the crew were drowned.

The plaintiffs allege that the defendants failed in breach of their duty to provide a seaworthy ship and